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Convention on the Rights of Persons with Disabilities

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Committee on the Rights of Persons with Disabilities

Decision adopted by the Committee under article 2 of the Optional Protocol, concerning communication No. 31/2015*, **

Communication submitted by:	D.L. (represented by G.L.)
Alleged victim:	The author
State party:	Sweden
Date of communication:	8 July 2015 (initial submission)
Document references:	Special Rapporteur's rule 70 decision, transmitted to the State party on 20 July 2015 (not issued in document form)
Date of adoption of decision:	24 March 2017
Subject matter:	Prohibition of the use of facilitated communication as a method of communication in schools
Procedural issues:	Non-exhaustion of domestic remedies
Substantive issues:	Right to education; purpose of the Convention; reasonable accommodation; disability-based discrimination; accessibility; equal recognition before the law; freedom of expression and opinion, access to information
Articles of the Convention:	2, 3, 4, 5 (2) and (3), 9, 12, 21, 24 and 25
Article of the Optional Protocol:	2 (d)

1.1 The author of the communication is D.L., a national of Sweden born on 5 February 1995. He claims that the State party has violated his rights under articles 5, 24 and 25, read in conjunction with articles 2, 3, 4, 9, 12 and 21, of the Convention. The author is represented by G.L., his mother. The Optional Protocol entered into force for the State party on 14 January 2009.

* Adopted by the Committee at its seventeenth session (20 March–12 April 2017).

** The following members of the Committee participated in the examination of the communication: Ahmad Al Sarf, Danlami Umaru Basharu, Munthian Buntan, Ised Eddine Chaker, Theresia Degener, Jun Ishikawa, Samuel Njuguna Kabue, Hyung Shik Kim, Stig Langvad, László Gábor Lovaszy, Robert George Martin, Martin Babu Mwesigwa, Carlos Alberto Parra Dussan, Coomaravel Pyaneandee, Valery Nikitich Rozhkov, Jonas Ruskus, Damjan Tatić and Liang You.

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1.2 On 15 July 2015, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided not to issue a request for interim measures under article 4 of the Optional Protocol.

1.3 On 29 April 2016, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided, in accordance with rule 70, paragraph 8, of the Committee's rules of procedure, that the admissibility of the communication should be examined separately from the merits.

A. Summary of the information and arguments submitted by the parties

The facts as submitted by the author

2.1 The author has been diagnosed with "autism with a moderate development disorder". He is a student at Högsbodal Upper Secondary School for Children with Special Needs, in the municipality of Gothenburg, Sweden. At school, the author used the "facilitated communication" method as a tool of communication during school hours, to interact with staff and other students at the school.

2.2 In a decision of 19 December 2014, the Swedish Schools Inspectorate ordered the municipality of Gothenburg to ensure that facilitated communication was not used in any of the municipality's operations. The municipality implemented the decision.

2.3 The author argues that the prohibition on the use of facilitated communication by the Schools Inspectorate and the implementation of that decision by the municipality of Gothenburg immediately reduced his opportunities to participate actively in teaching sessions. He submits that the prohibition has lowered the standard of education that he receives and has prevented him from demonstrating that he has achieved the objectives set out in the curriculum. He alleges that the prohibition on the use of facilitated communication is a barrier to his academic development and amounts to a violation of his right to education.

2.4 The author refers to a report by a special teacher at Högsbodal Upper Secondary School. According to the report, when the author first joined the school in 2012, he used various kinds of image support techniques in order to express himself. He would then often get "stuck" on one image and the staff would have to guess what the author meant. The year before the author started using facilitated communication, he suffered from several outbursts of anger. On those occasions, the staff of the school had to medicate him with Valium to calm him down. The author argues that facilitated communication provided him with an augmentative tool to increase his communication flow and enabled him to express his thoughts and interests at a much deeper level.

2.5 The author notes that the decision of the Schools Inspectorate to stop the use of facilitated communication in schools, and the implementation of that decision by the municipality of Gothenburg, have forced him to return to communicating with staff at the school by pointing at images. As a consequence, he cannot make himself understood, and persists in pointing at the same image, frustrated by the inability of others to understand what he wants to say. The author adds that he has explicitly stated, through the use of facilitated communication, that he does not want to point at images, as he can write. The author argues that the more restrictive communication method of pointing at images is halting his educational development and his effective interaction with others. It goes against his will, is degrading and results in the underestimation of his abilities and potential.

2.6 The author also notes that the objective of the decision by the Schools Inspectorate to prohibit the use of facilitated communication was to protect him and to "act in his best interest". However, he considers that this reasoning is contrary to the core spirit of the Convention. The author refers to the Committee's general comment No. 1 (2014) on equal recognition before the law, in which it is stipulated that "the 'best interests' principle is not a safeguard which complies with article 12 in relation to adults. The 'will and preferences' paradigm must replace the 'best interests' paradigm to ensure that persons with disabilities

enjoy the right to legal capacity on an equal basis with others."[1] The author submits that he has clearly expressed his will and preference for the use of facilitated communication, but he considers that his position will not be taken into account as it was expressed through facilitated communication. He considers that to reject his expression of will because it was made through facilitated communication would prevent him from making a choice for himself.

2.7 The author further notes that his well-being has been affected by the Schools Inspectorate's decision to prohibit the use of facilitated communication and the municipality's implementation of that decision. As a consequence of not being allowed to communicate his thoughts, he suffers from outbursts of anger, which puts his and others' health at risk. During these outbursts, he is subjected to physical force by two or three assistants in order to avoid serious harm. In addition, he is subjected to medication with Valium, a heavy narcotic drug. When he was able to communicate through facilitated communication, he hardly required such medication, but currently, without the use of facilitated communication, he is prescribed one or two pills of Valium per day. The decision of the Schools Inspectorate and the implementation of that decision by the municipality have caused a serious deterioration in his health and increased his exposure to a medicine containing strong and potentially addictive substances.

2.8 The author appealed the Schools Inspectorate's decision on prohibiting the use of facilitated communication to the Administrative Court in Stockholm. On 21 January 2015, the court found that under chapter 28, section 18, of the Education Act, the decision of the Schools Inspectorate of 19 December 2014 was not subject to appeal. The court noted, however, that under the Administrative Procedure Act, the decision could still be appealed if this was considered necessary to satisfy the right to judicial proceedings regarding the determination of civil rights and obligations under article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention). However, the court found that the use of facilitated communication was not a civil right of the kind referred to in article 6.1 of the European Convention and that the decision of the Schools Inspectorate could therefore not be appealed. The author then sought leave to appeal the decision of the first instance court to the Administrative Court of Appeal. On 13 February 2015, the Administrative Court of Appeal rejected his request for leave to appeal.

The complaint

3.1 The author considers that by preventing him from using his chosen method of communication, namely facilitated communication, the State party has violated his rights under article 24 read alone and in conjunction with articles 2, 3, 4, 9, 12 and 21 of the Convention. The author argues that he has clearly expressed his will to use facilitated communication and submits that without facilitated communication he will not benefit from his education and will be hindered from reaching the goals of education.

3.2 As regards his allegations under article 24 as read in conjunction with article 12, the author claims that he has been denied the right to make a choice on an individual basis as to his method of communication. First, the Schools Inspectorate and the municipality assumed that he had chosen an educational method, when he had in fact chosen a means of communication. Second, by categorizing facilitated communication as an educational method, the Schools Inspectorate and the municipality were able to subject the communication method to the requirement that education "shall rest on a scientific basis and proven experiences", as stipulated under Swedish law.[2] The author notes that the Schools Inspectorate and the municipality considered that facilitated communication did not meet this requirement and thereby denied him the possibility to make a choice as to his preferred method of communication. The author submits that rather than categorizing facilitated communication as a "teaching method", the Schools Inspectorate and the municipality should have recognized it as an augmentative mode of communication that the author should be able to choose. The author argues that the erroneous categorization of facilitated communication as a teaching method hinders the communication choices of

[1] See para. 21.

[2] The author refers to the Education Act.

people with disabilities, thereby resulting in disability-based discrimination. The author also argues that to question his choice of method of communication due to it having been expressed through facilitated communication would allow States parties to be able to reject all expressions of will or choice that have been made through non-conventional modes of communication, by referring to a lack of verifiable alternatives for verification.

3.3 In regard to his allegations under article 24 as read in conjunction with articles 2, 9 and 21, the author notes that under article 24 (3) of the Convention, States parties have an obligation to enable persons with disabilities to learn life and social development skills. The author also notes that this obligation includes the obligation of States parties to take appropriate measures to facilitate the learning of Braille, alternative script, and augmentative and alternative modes, means and formats of communication. The author argues that the obligation to facilitate diverse forms of communication is also central to article 9 of the Convention and that the right of choice in relation to modes of communication is explicitly recognized under article 21 of the Convention. The author submits that this right of choice should also be applicable to the right of choice of communication method in education, and argues that the definition of communication under article 2 of the Convention supports an inclusive approach as to what qualifies as communication protected under the Convention.

3.4 The author claims that the State party has not taken appropriate steps to provide him with reasonable accommodation in terms of his chosen method of communication, in violation of his rights under article 5 (3) of the Convention. He argues that accommodating his choice of communication in the school he is attending would not constitute a disproportionate or undue burden for the State party, as he was communicating with the staff at his school through facilitated communication prior to the decision of the Schools Inspectorate of 19 December 2014. No additional resources would therefore be needed to accommodate his choice of communication method. The author also claims that the requirement that methods of communication satisfy scientific criteria is a violation of his rights under article 5 (2) of the Convention. He considers that, as the requirement that communication methods should have a scientific basis is not applied in order to assess the validity of the communication preferences of persons without disabilities, the erroneous categorization of facilitated communication as a teaching method hinders the communication choices of persons with disabilities, but not of persons without disabilities, and is therefore discriminatory.

3.5 The author further claims that, as a consequence of not being allowed to communicate his thoughts, he suffers from outbursts of anger, which puts his and others' health at risk and which increases his exposure to a medicine containing strong and potentially addictive substances, in violation of his rights under article 25 of the Convention.

3.6 The author requests the Committee to ensure that the State party provides him with an opportunity to communicate through facilitated communication at Högsbodal Upper Secondary School for Children with Special Needs.

State party's observations on admissibility

4.1 On 21 September 2015, the State party submitted observations on the admissibility of the communication. It considers that the communication should be declared inadmissible under article 2 (d) of the Optional Protocol and rule 68 of the Committee's rules of procedure, for failure to exhaust domestic remedies.

4.2 The State party notes that on 21 January 2015, the Administrative Court in Stockholm dismissed the author's appeal against the Schools Inspectorate's decision of 19 December 2014. It also notes that the author submitted an appeal against the Administrative Court's decision to the Administrative Court of Appeal, which on 13 February 2015 decided not to grant leave to appeal. The State party notes that in his initial submission, the author asserted that it was not possible to appeal against the decision of the Administrative Court of Appeal and that he therefore had exhausted all domestic remedies.

4.3 The State party submits that, in compliance with section 33 of the Administrative Court Procedure Act, the decision of the Administrative Court of Appeal could have been appealed to the Supreme Administrative Court. The State party notes that this was also

evident from the decision of the Administrative Court of Appeal, which in its decision included a reference to an annex with information on how to appeal. The State party claims that by not submitting an appeal to the Supreme Administrative Court, the author did not give the domestic authorities the full possibility of examining the circumstances invoked. The State party notes that, if successful, an appeal to the Supreme Administrative Court could have led to a finding that the author was entitled to appeal the decision of the Schools Inspectorate and ultimately to an examination of his claim that the Schools Inspectorate's decision should be revoked. The State party submits that there is nothing to suggest that an appeal to the Supreme Administrative Court would have been unreasonably prolonged or unlikely to bring effective relief.

Author's comments on the State party's submission

5.1 On 18 December 2015, the author submitted his comments on the State party's submission. He considers that the possibility to appeal the decision of the Administrative Court of Appeal to the Supreme Administrative Court was not necessary in order to exhaust domestic remedies under article 2 (d) of the Optional Protocol. The author claims that an appeal to the Supreme Administrative Court would have prolonged the proceedings unreasonably and would have been "very unlikely" to bring effective relief. The author notes that it is close to certain that an appeal to the Supreme Administrative Court would not have brought any other outcome than a renewed denial of leave to appeal while his health would be further affected by the denial of his rights under the Convention.

5.2 The author notes that under section 36 of the Administrative Court Procedure Act, there are only two categories of cases for which the Supreme Administrative Court may grant leave to appeal, namely if it is important for guidance on the application of the law that the appeal be examined by the Supreme Administrative Court, or if there are extraordinary reasons for such an examination, such as a cause for extraordinary review[3] or if the outcome of the case in the Administrative Court of Appeal was obviously due to a gross oversight or error. The author claims that the Supreme Administrative Court rarely grants such leave to appeal. He refers to the official website of the Supreme Administrative Court, where it is indicated that the court receives around 8,000 applications for leave to appeal per year but only grants leave in 2 per cent of the cases. The author also notes that it is stated on the website that "in practice, the administrative courts of appeal are the final instance in most cases".

5.3 The author refers to the jurisprudence of the Committee, arguing that the review by the Swedish Supreme Administrative Court is limited to a very narrow and exceptional range of circumstances analogous to the four exceptional cases over which the Italian Court of Cassation had jurisdiction in *A.F. v. Italy*.[4] The author submits that his case did not fall under any of the two categories for which the Supreme Administrative Court may grant leave to appeal and that consequently he did not need to avail himself of this hypothetical possibility in order to exhaust domestic remedies.

5.4 The author also submits that an appeal that had no reasonable prospects of success would have merely extended the grave suffering that the discriminatory denial of facilitated communication had already caused him. The author notes that this suffering had consequences for his psychological as well as his physical integrity, as the denial of facilitated communication led to a situation where he was considered to be harmful to himself and to others, unless put under strong medication.

State party's additional observations

6.1 On 23 June 2016, the State party submitted additional comments on the admissibility of the communication. The State party notes that the author has not disputed that he did not appeal against the decision of the Administrative Court of Appeal, and that under Swedish legislation there is a possibility to appeal a decision not to grant leave to appeal by the Administrative Court of Appeal to the Supreme Administrative Court.

[3] The State party uses the wording "judicial review" rather than "extraordinary review".

[4] See communication No. 9/2012, *A.F. v. Italy*, Views adopted on 27 March 2015, para. 7.7.

6.2 The State party contests the author's claim that an appeal to the Supreme Administrative Court would have unreasonably prolonged the proceedings and that it would have been unlikely to bring effective relief. It considers that the present communication differs from *A.F. v. Italy*, as in that case it was evident that the Italian Court of Cassation was only able to examine the case on formal matters or errors of law, which excluded any re-examination of the merits of the case. The State party submits that applicable Swedish legislation permits a re-examination of the merits of the case if the conditions for granting leave to appeal are fulfilled, as section 36 of the Administrative Court Procedure Act stipulates that leave to appeal to the Supreme Administrative Court is granted if it is of importance for guidance in the application of the law that the appeal be examined, or if there are extraordinary reasons for such an examination, such as a cause for a judicial review, or if the outcome of the case in the Administrative Court of Appeal is obviously due to a gross oversight or gross error. In view of the above, the State party contends that the Swedish legislation regarding the appeal process and the conditions for granting leave to appeal are different from those in the Italian legislation referred to in *A.F. v. Italy*.

6.3 The State party submits that it is not in a position to assess whether an appeal from the author would have been successful or not, but nevertheless concludes that a re-examination of the merits of the case could have taken place if the Supreme Administrative Court had found a reason to grant leave to appeal. It argues that even though leave to appeal is only granted by the Supreme Administrative Court in relatively few cases, this fact does not per se indicate that an appeal against the decision of the Administrative Court of Appeal would have been unreasonably prolonged or unlikely to bring an effective remedy.

B. Committee's consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with article 2 of the Optional Protocol and rule 65 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

7.2 The Committee has ascertained, as required under article 2 (c) of the Optional Protocol, that the same matter has not already been examined by the Committee, and has not been and is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes the State party's argument that the complaint should be declared inadmissible under article 2 (d) of the Optional Protocol, as the author failed to appeal the decision of the Administrative Court of Appeal to the Supreme Administrative Court. The Committee also notes the author's argument that an appeal to the Supreme Administrative Court would have been unlikely to bring effective relief. The Committee recalls that domestic remedies need not be exhausted if they objectively have no prospect of success,[5] but that mere doubts as to the effectiveness of those remedies do not absolve the author from the obligation to exhaust them.[6] The Committee notes the author's submission that the Supreme Administrative Court only grants leave to appeal in 2 per cent of all cases submitted to it and only in exceptional circumstances. The Committee also notes that, according to the author, his case did not fall into any of the two categories of cases for which the Supreme Administrative Court may grant leave to appeal, namely: (a) if it is of importance for guidance in the application of the law that the appeal is examined; or (b) if there are extraordinary reasons for such an examination, such as a cause for a judicial review, or if the outcome of the case in the Administrative Court of Appeal was obviously due to a gross oversight or error. The Committee further notes that although the Supreme Administrative Court only grants leave to appeal in 2 per cent of all cases submitted to it, no elements in the file enable the Committee to conclude that the author's case could not have fallen within one of the two categories of cases for which the Supreme Administrative

[5] See Committee on the Rights of Persons with Disabilities communication No. 7/2012, *Noble v. Australia*, Views adopted on 2 September 2016, para. 7.7, and Human Rights Committee communication No. 941/2000, *Young v. Australia*, Views adopted on 18 September 2003, para. 9.4.

[6] See, for example, Human Rights Committee communication No. 674/1995, *Kaaber v. Iceland*, decision of admissibility adopted on 5 November 1996, para. 6.2.

Court may grant leave to appeal. In these circumstances, the Committee cannot conclude that an appeal by the author to the Supreme Administrative Court would have had no objective prospect of success.

7.4 The Committee notes the author's contention that the application of the available domestic remedy would be unduly prolonged. It observes that the decision of the Schools Inspectorate was taken on 19 December 2014 and that the author's appeal against this decision to the Administrative Court in Stockholm was dismissed on 21 January 2015. It also observes that the author's appeal to the Administrative Court of Appeal was rejected on 13 February 2015. Consequently, at the time of the decision of the Administrative Court of Appeal, less than two months had passed since the decision of the Schools Inspectorate. The Committee does not find this delay to be unduly prolonged. Additionally, the author has not provided any further argument to explain why he believes that an appeal to the Supreme Administrative Court would have been unduly prolonged. In view thereof, the Committee considers that the allegation of unduly lengthy proceedings has not been sufficiently substantiated and that this part of the communication is inadmissible under article 2 (d) of the Optional Protocol.

7.5 The Committee thus concludes that the information available in the file does not enable it to conclude that an appeal to the Supreme Administrative Court would be an ineffective or unduly prolonged remedy, and is therefore of the view that domestic remedies have not been exhausted under article 2 (d) of the Optional Protocol.

C. Conclusion

8. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 (d) of the Optional Protocol;

(b) That the present decision shall be communicated to the State party and to the author.